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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1076.

PHOENIX FINANCE CORPORATION, a Delaware Corporation, *Petitioner,*

V.

IOWA-WISCONSIN BRIDGE COMPANY, a Delaware Corporation, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

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BRIEF OF RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

OPINIONS BELOW.

Findings of fact, conclusions of law and decree of District Court of Iowa, in and for Allamakee County, R. 231-252. Opinion of Supreme Court of Iowa, R. 1923-1937, reported 20 N. W. (2d.) 457.

Opinions in the Federal Cause: United States District Court opinion, findings of fact and decree, F. R. 156-204 and 19 F. Supp. 127; affirmed Eighth Circuit Court of Appeals, F. R. 1689-1709 and 98 Fed. (2d.) 416; certiorari denied, 305 U. S. 650; rehearing denied 305 U. S. 676.

In supplemental and ancillary proceedings in federal cause, opinion of United States District Court, 32 F. Supp. 277; affirmed Eighth Circuit Court of Appeals, 115 Fed.

(2d.) 1; certiorari granted 312 U. S. 670; reversed on other ground 314 U. S. 118; rehearing denied 314 U. S. 385.

Opinion of the Supreme Court of the State of Delaware, Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error v. Phoenix Finance Corporation, plaintiff below, defendant in error, R. 178-198 and 25 Atl. (2) 383; certiorari denied 317 U. S. 671.

Petitioner Phoenix omits citing or referring to the decision of the Delaware Supreme Court. *The decisions of the Federal Courts and of the Delaware Supreme Court demonstrate that Phoenix' present petition and brief is but a repetition of what has been previously presented and decided.*

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U.S.C. Sec. 344(b)).

Petitioner claims there is involved a question of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States. This claim is denied by respondent for the reasons following:

(a) That the record does not furnish any basis for such claim.

(b) This question is not shown to have been presented to the court below.

White River Lumber Co. v. State of Arkansas, 279 U. S. 692, 700;

Rule 12, Par. 1.

(c) The cases cited by petitioner on page 5 of its petition with respect to this contention are not in point, in that all of those cases involved situations where the party sought to be bound by a former judgment was not a party, personally or by representation, or in privity with a party, in the case wherein the former judgment was rendered.

(d) Petitioner's claim of want of due process under

the Fifth and Fourteenth Amendments to the Constitution was a matter for it to assert in the original case in the Federal Court and if its claim was there denied its remedy was to appeal to the Circuit Court of Appeals and ask a reversal on that ground, and if its appeal was denied, to petition this Court for certiorari on the same ground. It could not attack the decree collaterally on that ground when it was invoked against it in the Iowa Courts, nor can it thus collaterally attack such decree before this Court.

Roller v. Murray, 234 U. S. 738, 34 S. Ct. Rep. 902.

Doctrine of due process under 14th Amendment to the Constitution does not involve the right to litigate the same question twice.

Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966.

STATEMENT OF THE CASE.

Phoenix' statements, pages 2-4 of its petition and 10-19 of its brief, are so inaccurate and incomplete that it is necessary for respondent to submit a statement of the case pointing out such inaccuracies and omissions as concisely as possible.

The United States District Court, for the Northern District of Iowa, in the Federal cause 19 F. Supp. 127 and in ancillary proceedings 32 F. Supp. 277 held that the matters here involved were adjudicated; this was affirmed by the Eighth Circuit Court of Appeals in 98 Fed. (2d.) 416 and in 115 Fed. (2d.) 1; the Supreme Court of Delaware held that the matters were previously adjudicated and that the petitioner was bound by such adjudication, R. 178-198, reported 25 Atl. (2) 383. The District Court of Iowa, in and for Allamakee County, R. 231-252, and the Supreme Court of Iowa, R. 1923-1937, reported 20 N. W. (2nd) 457, have held that the matters asserted in peti-

tioner Phoenix' petition have been previously adjudicated.

This Court has repeatedly held that the concurrent decisions of two courts upon a question of fact will be followed unless very clearly shown to have been erroneous, and there is no such showing in the instant case.

Brainard v. Buck, 184 U. S. 99;

Dunn v. Lumbermen's Credit Ass'n., 209 U. S. 20;

Alabama Power Company v. Ickes, 302 U. S. 464.

This action was brought by the petitioner for recovery on an alleged note and mortgage of the Bridge Company, dated March 10, 1931, in the sum of $50,000, with interest, and for the recovery of a $9,000 item it claims to have paid to Kramer & Hogg, and a $10,000 item claimed to have been paid to the Industrial Contracting Company, and a $11,262.71 item claimed to have been paid to McClintic-Marshall Company, and for the recovery of 517 shares of stock of the Bridge Company (R. 2-8 and R. 231, lines 22 to 34 and R. 232, lines 1 and 2).

The Bridge Company's answer alleged defense of *res judicata* based on the decisions of the United States District Court, for the Northern District of Iowa, and of the Eighth Circuit Court of Appeals, and of the Supreme Court of the State of Delaware, and said answer asked that said decisions be given full faith and credit and due force and effect under Section 1, Article 4 of the Constitution of the United States, and Section 905 of the U. S. Revised Statutes, and under Sections 1 and 2 of Article 3 and Section 2 of Article 4 of the United States Constitution and under Judicial Code Section 237(b) (R. 18-37). Copies of rulings, findings and decisions attached to answer as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", and "K" (R. 37 and 66-198).

Phoenix' reply admitted that said Exhibits were true and correct copies (R. 40-41 and R. 42, lines 5 to 13).

Respondent offered in evidence defendant's Exhibit "1"

(6 volumes and supplement) certified record of proceedings in the United States District Court, for the Northern District of Iowa, in the cause, entitled, *First Trust & Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, v. Iowa-Wisconsin Bridge Company, defendant, and Fayette D. Kendrick, et al., interveners;* also the record of the proceedings in the same case in the United States Circuit Court of Appeals for the Eighth Circuit.[1] (R. 199, Defendant's Exhibit "1" certified exemplified copy of certification of said record filed with the United States Clerk, 19 F. Supp. 127, 98 Fed. (2) 416; Stipulation, par. 2, R. 1951).

Respondent also offered in evidence defendant's Exhibit "2" transcript of testimony on original trial in the Federal Court which by stipulation is not set forth in record before this court because already set forth in narrative form in defendant's Exhibit "1" (R. 200; Stipulation, par. 3, R. 1951); and offered defendant's Exhibit "3" certified exemplified copy of opinion Eighth Circuit Court of Appeals which is set forth in Federal record Volume 6 (F. R. 1689-1709) and 98 Fed. (2) 416 (R. 201; Stipulation, par. 4, R. 1951); and offered certified copy mandate of the United States Eighth Circuit Court of Appeals (Exhibit "4", R. 201 and R. 1780-1783); and offered Exhibit "7" certified exemplified copy stipulated record in Supreme Court of Delaware in case, entitled, Iowa-Wisconsin Bridge Company, a corporation, defendant below, plaintiff in error, vs. Phoenix Finance Corporation, a corporation, plaintiff below, defendant in error (R. 202 and R. 1786-1917; Stipulation, par. 6, R. 1951-1952), and offered Exhibit "5" certified exemplified copy of pleadings in said Delaware cause

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[1] 1939 Code of Iowa, Section 11305:
"JUDICIAL RECORD—STATE OR FEDERAL COURTS. A judicial record of this state or any court of the United States may be proved by the production of the original, or a copy thereof certified by the clerk or person having the legal custody thereof, authenticated by his seal of office, if he have one."

set forth in stipulated record (R. 201-202; Stipulation, par. 7, R. 1952 and R. 1790-1800); and offered Exhibit "6" certified exemplified copy of writ of error Supreme Court of Delaware in said Delaware cause to Superior Court of Delaware (R. 202 and R. 1784-1785); and offered Exhibit "8" certified exemplified copy of Bridge Company's brief and argument filed in said Delaware cause in the Supreme Court of Delaware, one additional copy of which is filed herein under stipulation (R. 203; Stipulation, par. 9, R. 1952); and offered Exhibit "9" certified exemplified copy of brief and argument of Phoenix Finance Corporation filed in said Delaware cause in the Supreme Court of Delaware, one additional copy of which is filed herein under stipulation (R. 203 and stipulation, par. 10, R. 1952); and offered in evidence Exhibit "10" certified exemplified copy of the decision and final judgment of the Supreme Court of Delaware (25 Atl. (2) 383) which is not copied in the record because set forth as Exhibits "J" and "K" to defendant's answer in accordance with the stipulation (R. 203-204; Stipulation, par. 11, 1952, and see R. 178-199); and offered in evidence Exhibit "11" certified copy of the ruling and order of the United States Supreme Court denying Phoenix' petition for writ of certiorari to the Supreme Court of the State of Delaware in said Delaware cause (R. 204 and R. 1917).

The District Court of Iowa sustained the defense of *res judicata* and dismissed this case and entered judgment against Phoenix for costs (Findings of fact, conclusions of law and decree, R. 231-252).

The Supreme Court of Iowa affirmed, except as to said 517 shares (R. 1923-1937, 20 N. W. (2nd) 457) and denied petition for rehearing January 11, 1946 (R. 1953, 1957).

Phoenix, on page 2 of its petition and on page 11 of its brief, asserts that the Bridge Company agreed that the alleged $50,000 note and mortgage should be reinstated, citing alleged resolutions of the Bridge Company (R. 43-48).

All of the minute books of the Bridge Company were identified by Phoenix' president John A. Thompson and offered in evidence by complainants in the trial of the Federal cause (F.R. 538-541 and F.R. 590). Exhibit "6" (H.L.B.), minutes of board of directors and stockholders of Bridge Company from November 1st, 1930 to July 8th, 1933, was offered in evidence by the complainants in the federal cause (F.R. 590; Ex. "6" F.R. 861 to 1033). The particular resolutions referred to by Phoenix appear in said Exhibit "6" (F.R. 964-965; F.R. 979-981).

The Federal Court found that the Bridge Company at the time of the pretended resolutions was dominated by John A. Thompson president of Phoenix, and Phoenix, and found that the pretended note and mortgage were without consideration, fraudulent and void and that all of the alleged resolutions were fraudulent and void (F.R. 157, folio 230, F.R. 172-173, F.R. 175; Court's findings of fact 26, 37, 38 and 40, F.R. 191-192, F.R. 197-200 and F.R. 201-202).

The pretended note and mortgage were not reinstated (Court's Decree, F.R. 202-204).

The record shows without dispute that all the matters asserted in the instant case were considered and determined in the federal cause.

The District Court of Iowa in its order settling the record stated:

> "8. There is no dispute on the part of the appellant herein that the said appellant is the same Phoenix Finance Corp. as appears as co-plaintiff in the case entitled First Trust and Savings Bank et al. v. Iowa-Wisconsin Bridge Co. et al defendants, tried in the United States District Court for the Northern District of Iowa, Eastern Division before Judge George C. Scott, and appealed to the United States Circuit Court of Appeals. Likewise, neither is there any dispute that the $50,000 note and mortgage sued upon in this action, and $50,000 note and mortgage, and the $9,000 Kramer & Hogg Claim, the $10,000 Industrial Contracting Co.

Claim, the $11,262.71 McClintic-Marshall Claim, the stocks Certificate representing 517 shares of preferred stock, were all matters considered in the finding of fact and opinion rendered by the Honorable George C. Scott, Judge of the United States District Court, in the original foreclosure action and were also matters considered by the opinion rendered by the Eighth Circuit Court of Appeals on the appeal heard by the Honorable George C. Scott on December 1, 1936.

"9. Furthermore, there is no dispute on the part of the appellant herein that the plaintiff in this case and the Phoenix Finance Corp. in the case of the Iowa-Wisconsin Bridge Company tried in the Delaware Court, are the same. Further, neither is there any dispute that said Delaware Court in said cause, held that the note for $2,000 and the note for $3,125 were Res judicata in the aforesaid cause of action in the United States District Court Case.

"10. The Court believes that the proposed abstract of the record fully shows that the Phoenix Finance Corp., which was made a party in the action in the Federal District Court on the motion of the intervener, Fayette D. Kendrick, and that the matters on which the Phoenix Finance Corp. bases its cause of action in the case before this court were the same items of indebtedness existing between the Bridge Company and the Phoenix Finance Corp., which are mentioned in the finding of facts of the Federal District Court. *Furthermore, that attorney for the appellant, in open court, has stated that there is no issue in the pleadings in this cause, that the claims on which plaintiff bases its cause of action are not the same claims mentioned in the finding of facts and the opinion rendered by the Honorable George C. Scott in the trial of the said cause in the Federal District Court.*" (Emphasis supplied) (R. 254-255).

Phoenix assertion on page 11 of its brief, "that the federal court did not have jurisdiction of it because it had been neither an actual or a represented party to the federal foreclosure cause in respect of the debts in suit in the state court," is contrary to the record.

THE FEDERAL CAUSE.

PHOENIX WAS A REPRESENTED PARTY AND ALSO AN ANCILLARY PARTY IN THE FEDERAL CAUSE.

The federal action was instituted at the request and instigation of petitioner, Phoenix, and carried on at the expense of and under the direction of said Corporation by attorneys of its selection.[2]

The bill of complaint was filed August 28, 1933 in the name of First Trust and Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, resident of Wisconsin, as Trustees, v. Iowa Wisconsin Bridge Company, a Delaware corporation (F.R. 1-12).

Answer was filed September 25, 1933 (F.R. 62-67).

On September 26, 1933 the Court appointed a receiver of all of the property of the Bridge Company of every kind and took the same into legal custody (F.R. 68-72).

On December 5, 1933 Fayette D. Kendrick a stockholder of the Bridge Company and a citizen of Minnesota, with leave of Court, filed a petition of intervention (F.R. 73-83).

The intervener made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. 83-84, f. 119). The motion was granted. The court's order provided:

"The motion of Fayette D. Kendrick intervener to make additional parties plaintiff and defendant to the petition of intervention then came on for hearing and complainant's counsel having stated in open court that the Phoenix Finance Corporation *has succeeded* the Phoenix Finance

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[2] F.R. 537; Exhibit 28, H.E.B., F.R. 789-791; especially top 790, offered F.R. 535; Exhibit B, H.E.B. F.R. bottom 794, and top 795, offered F.R. 537; Exhibits B-1, H.E.B. (403 H.L.B.), B-2, H.E.B. (404 H.L.B.), B-3, B-4, B-5, B-6, B-7, H.E.B., F.R. 1478-1482, F.R. 617; approved as part of narrative statement, F.R. 709, bottom 720-721, 723; Exhibit B-6, on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its predecessor, F.R. 1481; approved as part of narrative statement, F.R. 709, 723.

System, Inc., and is the holder of the bonds involved in this action with the exception of about $10,000 worth of said bonds. It is hereby ordered and directed that the Phoenix Finance System, Inc., and the Phoenix Finance Corporation be made parties plaintiff in this cause, and defendants to the petition of intervention and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied) (F.R. 86).

Petition of intervention was ordered to stand as answer on part of the Bridge Company to complainants' petition (F. R. 100).

Subpoena was duly served on Phoenix Finance Corporation pursuant to said order (F.R. 87-89). Praecipe of appearance for Phoenix Finance Comporation was duly filed (F.R. 89). Phoenix Filed answer to petition of intervention (F.R. 91-92). Complainants filed reply to petition of intervention (F.R. 102-103).

Phoenix was given notice of the proceedings before the Master (F.R. 113-114). It took part in the trial not only by counsel for trustees of its selection, but it also appeared by its counsel W. B. Sloan. (F.R. 531.)

The complainants, trustees and Phoenix, called John A. Thompson, president of complainant Phoenix, as a witness in their main case, who testified as to the claimed underlying considerations for the bonds, and who was cross examined on the subject. (Direct examination, F.R. 538-542; cross examination, F.R. 542 to 545; cross examination on part of interveners, F.R. 545-556; recross examination, F.R. 560-561; further cross examination, F.R. 562-564; further cross examination on part of interveners, F.R. 633-637; F. R. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. 675-678; cross examination on part of interveners, F.R. bottom p. 678-685, F.R. 691-692.)

Phoenix filed exceptions to the Master's report reassert-

ing all the items involved in the instant case as considerations for the bonds stating, "Of course if the $50,000.00 mortgage, which was taken up by these bonds, was valid, then clearly, to the extent of $50,000.00 and interest the bonds are valid. We contend the record overwhelmingly supports that the bridge company gave Phoenix this mortgage for a valid and adequate consideration." (F.R. 1732 and particularly 1744-1747, same F.R. Sup. 14 particularly 26-29.)

The trustees filed exceptions to the Master's report, stating among other things, "Generally speaking, the master has approved the validity of bonds issued under the mortgage deed of trust to persons other than Phoenix Finance Corporation, successor in interest to Phoenix Finance System, Inc., and inasmuch as the exceptions filed herein on behalf of Phoenix Finance Corporation are necessarily a duplication of exceptions which the complainants in the ordinary course would file, for the purpose of avoiding unnecessary duplication and burden upon the court the complainants adopt said exceptions of said Phoenix Finance Corporation" (F.R. 1721 at 1725, par. (c), same F.R. Sup. 3 at 7, par. (c)).

The exceptions to the Master's report were overruled (Court's decree, F.R. 202-204).

Phoenix filed motion to vacate and to set aside decree, findings of fact and opinion on the claimed ground of want of jurisdiction (F.R. 204-205), to which motion the Bridge Company filed a resistance (F.R. 206-208). Motion overruled (F.R. 208-211).

Phoenix filed a petition for rehearing, and in the alternative for modification of decree verified by its president John A. Thompson (F.R. 216-223 and F.R. 224-391).

Trustees on the same day filed a motion for dismissal and in alternative petition for rehearing, Division I claiming want of jurisdiction as claimed in Phoenix' prior motion, and asking dismissal; Division II, in the alternative

for rehearing, *adopting the petition for rehearing of Phoenix.* Trustees' motion was verified by Phoenix' president John A. Thompson (F.R. 211-214).

Said motions and petitions were overruled (F.R. 411-413).

Trustees and Phoenix appealed to the Eighth Circuit Court of Appeals and filed assignments of error (F.R. 501-528).

PHOENIX' ASSERTIONS ON PAGES 12-14 OF ITS BRIEF WITH RESPECT TO THE ISSUES IN THE FEDERAL CAUSE ARE INACCURATE, INCOMPLETE AND DO NOT CONFORM TO THE RECORD.

The bill of foreclosure alleged: "That all of said bonds were duly made and executed on behalf of the (Bridge) Company, * * * and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued *for a good and valuable consideration* and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value." (Emphasis supplied) (F.R. 6). The bill prayed that an account be taken of the amount due on the bonds for principal and interest or otherwise, and that the defendant company be decreed *to pay to complainants* the amount found to be due on such accounting, plus costs and expenditures in the proceedings, and that in default thereof the property be sold to satisfy the amount so found due; and prayed *for deficiency judgment*, the appointment of a receiver, and *for general equitable relief* (F.R. 10-11).

The answer of the Bridge Company denied the validity of the deed of trust; alleged that there was a good defense to all or part of the bonds; and prayed that the plaintiffs be required to make a complete showing as to the consideration received by the Bridge Company in each

and every instance for the delivery of the bonds (F.R. 62-68).

The petition of intervention alleged that John A. Thompson and his associates were in control of both of the Bridge Company and of the Phoenix Finance System, Inc. (petitioner's predecessor) (F.R. 74), and dominated and controlled as aforesaid, the Bridge Company, in the month of March 1931, was caused to execute a note and mortgage to Phoenix Finance System, Inc., (petitioner's predecessor) in the sum of $50,000 without consideration; that said mortgage was invalid and void (F.R. 78, par. 9). That the Bridge Company thus dominated, as a part of a fraudlent scheme, plan and conspiracy, was caused to issue $200,000 of bonds secured by mortgage deed of trust and to issue bonds for the aforesaid purported $50,000 loan and other claimed obligations (F.R. 78-80). That the bonds and mortgage deed of trust were fraudulent, without consideration, invalid and void. The petition prayed that the bill be dismissed and prayed for general equitable relief (F.R. 80-83; amendment F.R. 100-102).

Phoenix filed answer to the petition of intervention denying all the allegations thereof and alleging that it was the *owner and holder for value of a large amount of bonds of the Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosure (F.R. 91-92).

The trustees filed reply to the petition of intervention denying the allegations thereof, etc. (F.R. 102-103).

Phoenix on page 13 of its brief asserts that no pleading named it as a party and no relief was prayed against it.

Phoenix was already a party in the lawsuit by representation by the trustees, with all the pleadings applying. The statement that Phoenix Finance Corporation had succeeded Phoenix Finance System, Inc. was made in open court by complainants' counsel who were of Phoenix' selection, and the Court upon such succession appearing

properly ordered Phoenix to be made a party co-complainant, and thus upon being made a party the pleadings on file applied to it as fully as though the petition of intervention had been amended inserting its name in lieu of that of its predecessor. The Court found that Phoenix and its predecessor were one and the same thing (Court's finding 41, F.R. 202). Phoenix made no objection to being made a party; did not move for further pleading, but filed answer to petition of intervention. The prayer of the bill of complaint and of its answer was its prayer, and the prayer of the petition of intervention the prayer against complainants, trustees and Phoenix. The trial proceeded and it is too late to object that additional pleadings and amendments were not filed. Phoenix was bound without them.[3]

Phoenix on page 14 of its brief asserts that, "No evidence was offered on its behalf at hearings before the Master." That assertion is contrary to the record.

Thompson, president of Phoenix and of its predecessor, and president of the Bridge Company at the time of the transactions, was called as a witness by complainants and

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3 *Himes v. Smith* (6 C.C.A.) 270 Fed. 132, cert. den. 255 U. S. 576, 41 S. Ct. 448, 65 L. Ed. 792;
Davis v. Zirkle, 80 Ind. A. 396, 138 N. E. 266;
Crary v. Kurtz, 132 Iowa 105, 107, 105 N. W. 990;
Nome & Sinook v. Ames Merc. Co. (9 C.C.A.), 187 Fed. 928;
Bell v. Corbin, 146 Ind. 269, 36 N. E. 23.
See 34 C. J. Sec. 1410, p. 994.

Rule 15-b of the Rules of Civil Procedure provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings."

Also see Rule 12-h, Rules of Civil Procedure.

testified directly and in detail as to the claimed underlying considerations of the bonds.[4]

Phoenix' assertion on page 14 of its brief that the decree merely denied foreclosure is contrary to the record. The Court rendered an opinion and made findings of fact as to all of Phoenix' claims in the instant case, and rendered a general judgment.

The decree provides (F.R. 204): "That the bill of the *plaintiffs* be dismissed as to the plaintiff, Phoenix Finance Corporation, and the prayer of the bill denied, except insofar as the decree provides for the protection of the holders of said $15,000 in bonds"; held by parties other than Phoenix.

The entire bill was dismissed, except insofar as relief was provided for certain holders of bonds. It was dismissed as to both the trustees and Phoenix, as far as Phoenix was concerned, and that is a general judgment and constitutes *res judicata*.[5]

Phoenix on pages 15-16 of its brief asserts: "Thus the grant of the sole power to the trustees to foreclose is absolute, but at the same time, the right of action for the debt evidenced by the bonds is expressly reserved to the bond-

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[4] Direct examination, F.R. 538-542; cross examination, F.R. 542 to 545; cross examination on part of interveners, F.R. 545-556; recross examination, F.R. 560-561; further cross examination, F.R. 562-564; further cross examination on part of interveners, F.R. 633-637, F.R. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. 675-678; cross examination on part of interveners, F.R. bottom p. 678-685, F.R. 691-692.

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[5] In *Hickey v. Johnson* (8 C.C.A.), 9 Fed. (2) 498, at 501 it is stated:

> "A general judgment or decree of dismissal, without more, renders all the issues in the case *res adjudicata*, and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based, or must expressly provide that it is made without prejudice." (Citing numerous cases)

holders and withheld from the trustees." That assertion is not sustained by the record.

THE TRUSTEES HAD BROAD POWERS OF REPRESENTATION, INCLUDING THE RIGHT TO RECOVER ANY DEBT FOUND DUE.

The bonds made reference to the mortgage indenture for description of the property mortgaged, "and the right of holders of said bonds in the respect of such security" (F.R. 775). The applicable provisions of the mortgage indenture are: The mortgage indenture made it the duty of the Bridge Company to pay taxes on the mortgaged property (F.R. 31); to pay the interest on the bonds and to pay the bonds as they matured (F.R. 29); to keep the property in thorough repair, etc. (F.R. 31).

In case of default in the payment of the principal of or any interest on any bond or bonds for sixty (60) days it was provided that the trustees "may" and upon the written request of the holders of twenty-five per cent of the bonds then in default, shall declare the principal of all bonds due and payable immediately (F. R. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders under this Indenture by a suit or suits in equity, or at law, * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate, legal or equitable remedy, as the Trustees * * * shall deem most effectual." (F.R. 38.)

It also provided: Art. V. Section 10. "The company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by

declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, * * * *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendency, of any proceeding for the enforcement of the lien of the indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof; and in case of a sale of the mortgaged property, and of the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive the amount then remaining due and unpaid upon any and all bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest * * * (F.R. 41-42). (Emphasis supplied.)

It is further provided: Art. V. Section 13. "No holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or law, for the foreclosure of this Indenture," except in case the trustees after notice and demand refuse to act. * * * "It being understood and intended that no one or more holders of bonds and coupons shall have any right

in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided, and for the equal benefit of all holders of such outstanding bonds and coupons." (F.R. 43-44.)

It then contains the paragraph quoted in Phoenix' brief on page 16, but that is immaterial. Phoenix did not act under that paragraph and the suggestion that it might have is merely a hypothetical suggestion. The trustees and Phoenix based their bill of complaint on the broad powers of representation through counsel chosen and paid by Phoenix.

Phoenix' brief, pages 16-18, note 14, seeks to question its own notice and demand on the Bridge Company. On July 12, 1933 Phoenix wrote trustees to declare all bonds immediately due and payable (F.R. 789-791). On July 13, 1933 trustees sent notice to the Bridge Company declaring all bonds due (F.R. 791-793). On August 28, 1933 the bill of foreclosure was filed (F.R. 1) reciting due demand (F.R. 8-9, par. 12). Phoenix now says that the bill was filed 46 days after the demand instead of 60 days.

Answer was filed on September 25, 1933 (F.R. 62-68) and petition of intervention was filed on December 5, 1933 (F.R. 73-83). Neither questioned the sufficiency of the demand. The petition of intervention alleged that the bonds and mortgage were fraudulent, without consideration, invalid and void; that obviated and waived any question of the sufficiency of the demand. 1 Corpus Juris Secundum, Section 27, pages 1070-1071.

Phoenix is not in position to question its own demand and to collaterally attack the decree of the Court.

FEDERAL COURT'S FINDINGS.

With respect to the $50,000 mortgage the Court found:

"26. A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1685 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held attended only by Thompson directors, viz., V. W. O'Connor, John A. Thompson, A. C. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000 mortgage to the Phoenix Finance System, Inc., on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the Bridge Company then had nothing to do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000 of its stock and $10,000 in cash for the completion of the bridge. That pursuant to such resolution a mortgage was executed to Phoenix Finance System, Inc., for $50,000 signed on behalf of the Bridge Company by A. B. Wilder, who was then also an officer and director of said mortgage company. That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc., existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company." (F.R. 191-192).

With respect to the $9,000 item to Kramer & Hogg, the Court in its opinion with respect to the Master's Conclusion No. 5 stated:

"This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that in so far as the language of the Master's conclusion includes the $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successor of Phoenix Finance System, Inc., places it completely upon a level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the Bridge Company without paying any subscription price therefor and has not accounted for it." (F.R. 177-178.)

By its findings numbers 27, 28, 29, 30 and 41 the court found that as a result of various fraudulent transactions Phoenix had become indebted to the bridge company in amounts which aggregate $26,085.85, $14,000 thereof being for stock of the Bridge Company, which the Phoenix received and disposed of without payment therefor to the Bridge Company (F.R. 192-194, both inclusive; F.R. 202).

With respect to the $10,000 item to Industrial Contracting Company and the $11,262.71 item to McClintic-Marshall Company, asserted in the instant case the Court found:

"40. That on March 7, 1932, a meeting of the board of directors of the Bridge Company was held at which were present Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance System, Inc., controlled directors, at which a purported resolution was adopted for the delivery of $97,000 of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc., for the purported $50,000 mortgage and interest thereon and for $10,000 to the Industrial Contracting Company, $9,000 to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of

$461.42 being charged to Phoenix Finance System, Inc., on the books of the Bridge Company, making a total of $97,000.

"The aforesaid $10,000 to the Industrial Contracting Company was neither due from nor paid by the Bridge Company as aforesaid and the Bridge Company did not owe the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John W. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc., had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds here involved, the said Thompson paid the balance of $11,262.71 to McClintic-Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its acts, in making payment thereof for the Phoenix Finance System, Inc., as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System, Inc., to the Bridge Company and the item paid by the Bridge Company, when in fact the Bridge Company did not owe said item." (F.R. 201-202).

COURT'S DECREE.

"* * * That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000, hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000 in bonds." held by parties other than Phoenix. (F.R. 203-204.)

Complainant Phoenix filed petition for rehearing and modification of decree, reasserting the items in the instant case as underlying considerations for the bonds including

the pretended resolutions now asserted (F.R. 216-391, particularly F.R. 244-245). The petition prayed:

> "Wherefore, petitioner prays:
>
> "First. That a rehearing be granted herein, and that it be given leave to present the new evidence aforesaid.
>
> "Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000.00 mortgage given by the Bridge Company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires.
>
> "Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of "A" stock surrendered in exchange for bonds.
>
> "Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the Bridge Company, if it so desires, for money had and received." (F.R. 223).

Complainant trustees filed motion for dismissal and in alternative petition for rehearing adopting in its entirety Phoenix' petition for rehearing and the prayer thereof. Said motion was verified by Phoenix' president Thompson (F.R. 211-214, particularly 214).

The Bridge Company and interveners filed answer to the petitions for rehearing, stating, among other things, that the alleged $50,000 mortgage to Phoenix was made and also released as a part of a fraudulent scheme, plan and conspiracy (F.R. 394-410, particularly 398). Said motion and petitions for rehearing were overruled (F.R. 411-413).

Trustees and Phoenix both appealed to the Eighth Circuit Court of Appeals and assigned all the rulings, opinions, findings, decree and orders of the trial court as error (F.R. 502-528; see particularly trustees' assignments 13, 20, 26, F.R. 505-507; Phoenix' assignments 11, 12, 13, 31, 37,

38, 45, 47, 61, 63, F.R. 510-511, 516-517, 519-520, 523-524, 524-525, 527).

ARGUMENT.

SUMMARY OF ARGUMENT.

Phoenix' entire argument is based on the fallacious assumption that there is a question of jurisdiction involved. No such question is involved. Phoenix was the party to the federal cause. Phoenix was fully represented in the proceeding by the trustees. Phoenix was also an ancillary party to the proceedings. Phoenix present contentions were asserted in the federal cause and again asserted in the Supreme Court of the State of Delaware and adjudicated adversely to it, and certiorari was denied by this Court in both instances.

The question of consideration was directly in issue; the trustees had full authority to litigate the question and they litigated it under the direction of Phoenix. Phoenix is bound by the adjudications. The decision in the case of *Mackay v. Randolph Coal Company* was in effect overruled by the same Court that rendered it.

Successful defense to an action on collateral bars an action on the debt. A party cannot seek a foreclosure of a mortgage in one action and in a subsequent action ask for personal judgment against the defendant.

The Federal Court held, found and decreed that Phoenix was not entitled to recover the $9,000 item.

ARGUMENT.

Phoenix' entire argument is based on the fallacious assumption that there is a question of jurisdiction involved. Such question was disposed of by the Eighth Circuit Court of Appeals (F.R. 1693-1694; 98 Fed. (2) 416, 420-421), and

by this Court's denial of certiorari 305 U. S. 650; rehearing denied 305 U. S. 676.

RESPONSE TO POINTS I AND II OF PHOENIX' BRIEF PAGES 22-29.

PHOENIX WAS THE PARTY TO THE FEDERAL CAUSE AND IS BOUND BY THE FINDINGS, DECREE AND ORDERS THEREIN; (a) PHOENIX WAS FULLY REPRESENTED IN THAT PROCEEDING BY THE TRUSTEES; (b) PHOENIX WAS ALSO AN ANCILLARY PARTY TO THE PROCEEDINGS.

Phoenix directly designated the trustees as its representatives and agents to litigate the matter. It instigated the federal action and that was carried on at the expense of and under its direction by attorneys of its own selection. Phoenix had the trustees adopt its exceptions to the Master's report and had them adopt Phoenix' petition for rehearing and modification of decree, and both Phoenix and the trustees appealed.

In *Souffront v. LaCompagnie Des Sucreries De Porto Rico*, 217 U. S. 475, 30 Sup. Ct. 608, at 612 the Court said:

> "The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129."

Also see:

Robbins v. City of Chicago, 4 Wall. 657, 71 U. S. 657, 672, 18 L. Ed. 427;

Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 N. W. 423, 65 A.L.R. 1125;

Fulsom v. Quaker Oil & Gas Co., (8 C.C.A.) 35 Fed. (2d) 84, 90;

Plumb v. Crane, Admr. etc., 123 U. S. 560;

Stoddard v. Thompson, et al., 31 Iowa 80.

The Eighth Circuit Court of Appeals held that the Court had jurisdiction to decide every issue including the amount of the debt (F.R. 1694, 98 F. (2nd) 416, 421).

Phoenix was also an ancillary party to the proceeding; it was given notice of the proceedings before the Master; it took part in the trial by counsel for trustees of its selection and by its counsel W. B. Sloan; filed exceptions to the Master's report and took part in every step of the proceedings.

Phoenix in the federal case contended, as in the instant case, that the federal cause involved two separate suits, one brought by the trustees to foreclose a deed of trust, and one brought by the Bridge Company and interveners to cancel the bonds held by Phoenix. With respect to that contention the Eighth Circuit Court of Appeals said: (R. 1794, 98 Fed. (2nd) 421)

> "Appellants contend that the proceeding below was a consolidation of two separate and distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by Phoenix; and that jurisdiction as to each controversy must be determined separately. This contention is without merit. * * * Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespec-

tive of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. *Morgan's Louisiana & T. R. & S. S. Co. v. Texas Central Ry. Co.*, 137 U. S. 171, 201, 11 S. Ct. 61, 34 L. Ed. 625; *Krippendorf v. Hyde*, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145. The court did not err in overruling appellants' attack on the jurisdiction."

Certiorari denied 305 U. S. 650; rehearing denied 305 U. S. 676.

The same contentions asserted by Phoenix in the instant case were asserted by it in the Supreme Court of Delaware and the same federal record was before that Court.

In *Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error, v. Phoenix Finance Corporation, plaintiff below, defendant in error*, the Court said: (F. 191-192, 25 Atl. (2) 383, at 390)

"The trustees, and, it must be said, Phoenix as well, based their bill of complaint on the theory of a broad power of representation; for they, through counsel chosen and paid by Phoenix, challenged inquiry into the consideration received by the Bridge Company for the issuance of the bonds, and prayed that an account be taken of the amount due on them. Both the defendant's answer and the petition of intervention, taken as such, accepted the challenge by denying the existence of a valid consideration. The issue was sharply and precisely drawn by the pleadings; and there was no effort made by the complainants to reframe their bill, or to have stricken from the answers, as being immaterial or irrelevant, the allegations that the bonds had been issued without valid consideration. Phoenix, likewise, kept silent; and the issues as forced by the complainants in their representative capacity and with, at the least, the tacit approval and consent of Phoenix, embraced both the validity of the mortgage as a lien on the property of the Bridge Company and the pre-existence of a debt or obligation in support of the bonds for the security of which the mortgage was given. The latter issue evoked a mass of testimony; and on the issue, Thompson, president of Phoenix and of its predecessor, and president as well of the Bridge Com-

pany testified directly and in detail. Full opportunity was afforded the bondholders to show that the Bridge Company had received a fair consideration for the bonds. If the results of the proceeding were disappointing to Phoenix the cause must be attributed to the stubborn facts of the case, and not to any want of time or season for the development of the truth. See 115 F. 2d 1, at pages 6, 7."

RESPONSE TO POINTS III AND IV OF PHOENIX' BRIEF PAGES 29-36.

THE QUESTION OF CONSIDERATIONS WAS IN ISSUE. THE TRUSTEES HAD FULL AUTHORITY TO LITIGATE THE QUESTION OF CONSIDERATIONS AND THE EXISTENCE OF DEBT AND LITIGATED THEM UNDER THE DIRECTION OF PHOENIX. PHOENIX WAS ALSO AN ANCILLARY PARTY. PHOENIX IS BOUND BY THE ADJUDICATIONS.

The question of lack of considerations for the bonds was directly involved in the suit. Every question relating not only to the fraud but to the considerations was fully tried and fully determined by the court. The claimed underlying considerations of the note and mortgage and other items involved in the instant case, and the note and mortgage themselves and other items were all put forward as claimed considerations for the bonds and were fully investigated to the minutest detail and determined.[6]

As said in *Jones on Mortgages*, 8th Ed., Sec. 316 at page 289:

> "A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt.

[6] Phoenix' exception 5, F.R. 1744-1747 same F.R. Sup. 26-29; Mortgage Exhibit B-25 H.E.B., F.R. 823-825; Off. F.R. 611-612, F.R. 578-580, F.R. 551-552; Court's opinion, findings of fact and final decree, F.R. 156-204, and particularly opinion F.R. 172-173.

> There must be a debt, or there can be no security for its payment.' Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie."

And in *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313, it is stated:

> "Upon bill of foreclosure * * * an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

See also:

Ariz. Copper Estate v. Watts, 237 F. 385;

Holladay v. Willis, 101 Va. 274, 43 S. E. 616;

Saunders v. Dunn, 175 Mass. 164, 55 N. E. 893;

49 C. J., page 903, Sec. 23;

Chapman v. Sipe Springs First Nat. Bank, 275 S. W. 498 (Tex.);

Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

Phoenix cites and quotes from *Mackay v. Randolph Macon Coal Company* (8 C.C.A.), 178 Fed. 881. That case involved a question of merger not of *res judicata* and was decided under earlier equity rules and was in effect overruled by the same court that rendered it.

In *Lane v. Equitable Trust Company of N. Y.* (8 C.C.A.), 262 Fed. 918, certiorari denied 252 U. S. 578. The Court said with respect to the *Mackay* case at page 922:

> "It was not held in that case that the deficiency judgment was invalid. It was held that the doctrine of merger did not apply. It is true that language was used in that opinion which went beyond the point in-

volved in the case, as stated in the opinion, but 'the language of the opinion cannot be separated from the facts of the case.'"

In the *Lane Case* which involved the foreclosure of a trust deed in the case of *Equitable Trust Company of N. Y. v. Wabash R. R. Co., et al.*, wherein the trust deed as quoted at page 924 of the opinion contained in substance and effect the same provisions contained in the trust deed in the instant case, Article 5, Section 10 (F.R. 41-42, quoted *supra* this brief).

The Court said at page 925:

> "It thus appears that a deficiency judgment was expressly provided for in the deed of trust, that in the decree the special master was expressly directed to report the amount of the deficiency, if there should be one, and that the trustee should be entitled to have judgment for the amount of such deficiency. We think that rule 10 authorized a deficiency judgment in this case."

It should be kept in mind that it is the Eighth Circuit Court of Appeals that rendered the decisions in this case, 98 Fed. (2) 416 and 115 Fed. (2) 1, and if the *Mackay* case had had any application to the facts in this case it would have been mentioned by the Eighth Circuit Court of Appeals.

In the case of *Fidelity-Philadelphia T. Company v. Hale & Kilburn Corp.* (Sept. 16, 1937), 24 Fed. Supp. 3 at 11, the court said:

> "On May 4, 1925, the rule was amended, 28 U.S.C.A. following Section 723 (268 U. S. 709), so that now it reads as follows: 'In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the

debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it pro rata among them according to their respective interests.'

"It will be noted that the amendment of May 4, 1925, which is the rule now in force, besides expressly giving a trustee, who does not actually own the debt, the right to recover a deficiency judgment, omitted the words, 'to the plaintiff' from the clause 'any balance that may be found to the plaintiff.' How important this omission is can be seen from the majority and dissenting opinions in *Lane v. Equitable Trust Co.*, 8 Cir., 262 F. 918, 922.

"It is beyond question that the Amendment of 1925 to Rule 10 gives a trustee for bondholders under a corporate mortgage a standing in court as a party to recover a deficiency judgment in a foreclosure proceeding without regard to whether or not he is vested with the ownership of the debt, right to sue or chose in action. The rule does not change substantive rights. It does not affect what was said in *Continental-Equitable Title & Trust Co., supra,* to the effect that actual ownership of the debt does not vest in the trustee until demand. It is procedural, and merely makes an agent a proper party to recover a judgment, not for himself as owner of the debt, but for his principals. The rights of the real owners of the debt are guarded by the last sentence of the rule. Moreover, prior to the Amendment of 1925, the question had been raised in *Mackay v. Randolph Coal Co., supra,* whether the parties by agreement could give to a third party (the trustee) the right to sue to recover a debt without actual ownership of the debt. It seems more than likely that the Amendment of 1925 was promulgated to meet the difficulties which the extremely technical position adopted by the courts in the cases referred to had thrown in the way of corporate foreclosures for the benefit of bondholders. At any rate, those decisions, in view of the changed equity rule are no longer controlling. I therefore conclude that failure to make a

demand does not bar the right of the trustee to deficiency decrees in this suit."

Code of Iowa 1935, Section 10968:

"PLAINTIFF AS LEGAL REPRESENTATIVE. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted."

In the leading case of *Kerrison v. Stewart*, 93 U. S. 155, 25 L. Ed. 843, this Court said:

"Under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, * * *; or to one by a stranger against him to defeat it in whole or in part. * * *. In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, *are bound by the judgment*, unless it is impeached for fraud or collusion between him and the adverse party.

"The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bond holders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience.

"Undoubtedly, cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustee to represent their interests. *They then become proper parties, and may be brought in or not, as the court in the exercise of its judicial discretion may determine.* But this was very clearly not a case in which such action was required, and so all the parties evidently thought, while the litigation was progressing. * * *

"If the creditors, mindful of their interests, are dissatisfied with the manner in which he represents them in suits that are pending, they may, under proper circumstances, intervene and ask to be made parties, so as to speak for themselves; but their adversary need not go after them, except under the direction of the court."

The same contentions now made by Phoenix were made by Phoenix in a prior petition for writ of certiorari and determined by this Court:

In *Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error, v. Phoenix Finance Corporation, plaintiff below, defendant in error,* the Supreme Court of Delaware, speaking through Chief Justice Layton, said: (R. 191, lines 3 to 31, R. 192, lines 1 and 2, 25 Atl. (2) 383, at 389-390.)

"Here, the bonds expressly referred to the indenture for a statement of the rights of the bondholders. The bondholders themselves were expressly denied the right to sue for their own protection except in certain defined circumstances. On the other hand, the trustees, upon defaults declared, and upon the request of holders of bonds in the specified amount, were required to proceed to protect and enforce the rights of the bondholders by foreclosure of the mortgage, or for the enforcement of any other appropriate legal or equitable remedy, as might be deemed most effectual. These provisions are broad and comprehensive. *Mercantile Trust Co. v. Schlafly, supra.* They were an essential part of the bonds. *Continental-Equitable Title & Trust Co. v. National Properties Co.*, 273 F. 967; *Central National Bank v. Bateman & Companies, Inc.*, 15

Del. Ch. 31, 131 A. 202. Clearly it was to the advantage of the bondholders to have adjudicated both the validity of the mortgage as a lien on the property and the legal sufficiency of the bonds. See *Speers Sand & Clay Works, Inc. v. American Trust Co.*, 20 F. 2d 333. If both of the objects plainly of benefit to the bondholders could be accomplished under proper pleadings in the foreclosure proceeding, all the rights of the bondholders would be settled. Moreover, a deficiency judgment was prayed for, which, in itself, would seem to require inquiry into the existence and amount of the underlying debt. In these circumstances, it would be difficult, we think, successfully to maintain that the power of representation conferred on the trustees was so narrow as to exclude from inquiry and determination the existence and extent of the consideration underlying the bonds. Essential privity between the trustees and their beneficiaries was not wanting. See *McPherson v. Commercial Building & Securities Co.*, 206 Iowa, 562, 218 N. W. 306."

Certiorari denied October 26, 1942, 317 U. S. 671.

Also see:

Beals v. Illinois & R. R. Co., 133 U. S. 290, 10 S. Ct. 314, 33 L. Ed. 608;

Elwell v. Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998;

Richter v. Jerome, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132;

Shaw v. Little Rock & Fort Smith R. R. Co., 100 U. S. 605, 25 L. Ed. 757;

Mercantile Trust Co. v. Schlafly, 299 F. 202;

Kent v. Lake Superior Ship Canal, Ry. & Iron Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. Ed. 352;

In re *Franklin Brewing Co.*, 254 F. 910;

7 *Fletcher Cyc. Corp.*, Sec. 3262, 3265.

SUCCESSFUL DEFENSE TO ACTION ON COLLATERAL BARS AN ACTION ON THE DEBT.

Want of consideration of the particular note and mortgage and items herein involved as a consideration for bonds was directly in issue in the foreclosure case. There was but one cause of action as far as the note and mortgage and other items were concerned and that was the cause of action based on the claimed debts evidenced by and underlying the note and mortgage and other items. It was on the basis of these claimed debts that recovery was sought on the bonds and the Federal Court has adjudicated that such debts do not exist. And it is now on these same claimed debts that the present action is based.

The rule is stated as follows in 34 C. J. page 853:

> "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

In support of this are cited among other cases, *Johnson v. Forstall, et al.*, 3 La. Ann. 466, and *Sykes v. Gerber*, 98 Penn. Stat. 179.

In the last cited case there has been a suit on a promissory note, with judgment for defendant. An action was then commenced on the original debt. The Court said:

> "The original claim and the note were by the same parties, for the same consideration and payment of either would have satisfied both. A judgment in favor of the creditor upon either would be a bar to a recovery on the other. And a judgment for the debtor in an action which finally disposed of the note for equally good reason is a complete defense against a suit upon the account or claim which the note represented."

In *Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663, this Court said:

"They were represented by the trustee, and the judgment which he recovered settled finally against them, and all claiming under them, as well as against Wood (the trustee) the amount recoverable."

Also see:

Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205;

Thompson v. Roberts Bros., 65 U. S., 24 How. 233, 4 Mill. Dec. 94, 16 L. Ed. 648.

In *Kenyon v. Wilson, The Same v. Baker*, 78 Iowa 408, the Court said:

"An adjudication is final and conclusive of all matters in a case which the parties could have presented to the court for adjudication in the case. The law hates a multiplicity of suits, and will not permit a plaintiff to split up his demands, presenting one at a time, in separate successive actions. He must litigate all matters growing out of his causes of action upon which a remedy may be sought in one action. *Thus he cannot seek a foreclosure of a mortgage in one action, and in a subsequent action ask for a personal judgment against the defendant. He could have recovered both remedies in the first action, and must be content with what he first recovers.*" (Emphasis supplied.)

Also see:

Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error, v. Phoenix Finance Corporation, plaintiff below, defendant in error, (R. 178-196) 25 Atl. (2) 383.

Phoenix, on page 36 of its brief, asserts that it was agreed that the $50,000 mortgage should be reinstated. Agreed by who?

The pretended resolutions upon which Phoenix bases the assertion were offered in evidence in the Federal cause; they were passed as a part of a fraudulent conspiracy while Thompson-Phoenix dominated and controlled the Bridge Company. The court found the purported resolutions to

be fraudulent, a part of the acts of a fraudulent conspiracy, and that the mortgage was executed as a part of the conspiracy and that it was wholly without consideration, fraudulent and void. Phoenix cannot revive what the Court has condemned and held fraudulent and void.

RESPONSE TO POINT V OF PHOENIX' BRIEF PAGES 36-39.

THE COURT HELD, FOUND AND DECREED THAT PHOENIX WAS NOT ENTITLED TO RECOVER THE $9,000 ITEM.

Phoenix' assertion that the $9,000 Kramer & Hogg item was a part of the underlying considerations for the $50,000 mortgage, and that there was no finding with respect to it is contrary to the record. The $9,000 item was asserted in the trial as an alleged additional consideration for the $97,000 of bonds (see Phoenix' exception 5, F.R. 1745 same F.R. Sup. 27). The mortgage having its inception in fraud was a dead instrument from the day of its execution and was so found by the court and Phoenix cannot now infuse it with life.

Thompson, president of Phoenix, was also president of the Bridge Company and he and other directors were also directors of the Bridge Company controlling and dominating the Bridge Company (Findings 19, 20, 26 and 40, F.R. 188, 191-192, and 201-202), and at the time of the alleged $9,000 payment to Kramer & Hogg, and at the time of the delivery of the bonds, they were in duty bound merely to credit any payment claimed to have been made by Phoenix to or for the Bridge Company on the amounts due the Bridge Company from Phoenix.

This Court has said:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged *the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character.* This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy." (Emphasis supplied.)

Geddes et al. v. Anaconda Copper Mining Co., 254 U. S. 590.

Such transactions are presumptively fraudulent.

Thompson and his controlled Phoenix, dominating and controlling the Bridge Company, owed a fiduciary duty to the Bridge Company, in the performance of which the law forbade them to take bonds for any payments claimed to have been made by Phoenix to the Bridge Company or for it while Phoenix was indebted to the Bridge Company in a far greater amount, and having acted in a dual capacity the note, mortgage and bonds were presumptively fraudulent.

In Vol. 3, *Thompson on Corp.*, pages 217, 218, Section 2289, it is said:

"But the rule is also well settled that where, under proper pleadings, fraud or illegality in the issue or sale of such bonds or coupons has been shown, then the holder or indorsee, before he is entitled to recover, must prove that he is a holder for value; *and the mere possession of the paper* under such circumstances is *not sufficient.* The reason of this rule is that the proof that the instrument was unlawful or fraudulently issued overcomes the presumption of the *good faith* on the part of the holder, and then casts upon him the *burden* of proving that he was a purchaser for value

before maturity and without notice of any defense * * *."

Full inquiry and examination was made by the court as to the claimed underlying considerations of the note and mortgage, said $9,000 item, other items and the bonds in question. All the evidence bearing thereon was presented and analyzed in detail and from it the Court found that there in fact was no consideration for the note and mortgage, nor for the $9,000 Kramer & Hogg item, nor for the other items, nor for the bonds; that Phoenix in fact at the time of the payment claimed as a consideration for said $9,000 item was indebted to the Bridge Company in a far greater amount; that in law any payments made by Phoenix were merely a partial payment of its indebtedness to the Bridge Company and that no consideration existed for the above items.

The Court in its opinion said:

> "This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that in so far as the language of the Master's conclusion includes the $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successor of Phoenix Finance System, Inc., places it completely upon a level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the Bridge Company without paying any subscription price therefor and has not accounted for it." (F.R. 177-178.)

The court found that as a result of various fraudulent transactions Phoenix had become indebted to the Bridge Company in amounts which aggregated $26,085.85, $14,000 of which represented the value of 140 shares of the Bridge Company's stock which Phoenix had received and disposed

of without payment therefor to the Bridge Company (Court's findings 27, 28, 29 and 30, F.R. 192-194). The Court, accordingly, disallowed the items of $9,000 and $3,-125.

The Court in its decree sustained said exception eight. The decree states:

> "The defendant and interveners' exceptions numbered eight, nine and eleven are sustained, with exceptions reserved to all opposing parties."

The decree further provided: * * *

> "That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000, hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000 in bonds" held by parties other than Phoenix (F.R. 203-204).

Both trustees and Phoenix, complainants, on appeal assigned as error the Court's decision as to said $9,000 item. Trustee's assignments: (F.R. 505)

"12.

"(b) The court erred in concluding that the Master in his Conclusion of Law No. 5 erred in holding that the $9,000 of bonds and the $3,125 of bonds in the hands of Phoenix Finance Corporation were valid; and erred in failing and refusing to sustain the validity of bonds to the extent of the two amounts aforesaid in the hands of Phoenix Finance Corporation."

"(d) The court erred in concluding in effect, that the $9,000 and $3,125 of bonds held by Phoenix Finance Corporation were tainted with fraud and were illegal."

Phoenix' assignments: (F.R. 510-511)

"11.

"(c) And the court erred in its modification of the Master's Finding No. 8 by disallowing even the $9,000 of bonds delivered on account of the payment of that amount to Kramer & Hogg."

"12.

"(b) And the court erred in its modification of the Master's Finding No. 9 by disallowing even the bonds issued for the $9,000 paid to Kramer & Hogg and in adjudicating said bonds illegal."

"13.

"The court erred in refusing to adopt the finding of the Master in Finding No. 10-A that the Bridge Company received full consideration for the $9,000 of bonds issued to Kremer & Hogg, in settlement of a mechanic's lien claim, and erred in holding that said bonds were invalid."

Errors Based on the Opinion: (F.R. 524-525)

"47.

"(b) The court erred in concluding that the Master in his Conclusion of Law No. 5 erred in holding that the $9,000 of bonds and the $3,125 of bonds in the hands of Phoenix Finance Corporation were valid; and erred in failing and refusing to sustain the validity of bonds to the extent of the two amounts aforesaid in the hands of Phoenix Finance Corporation."

"(d) The court erred in concluding, in effect, that the $9,000 and $3,125 of bonds held by Phoenix Finance Corporation were tainted with fraud and were illegal."

The Eighth Circuit Court of Appeals in its opinion said: (F.R. 1704, 1709, 98 Fed. (2) 425-426, 429.)

"The Master found that the bridge company received full consideration for the $9000 paid by Phoenix to

Kramer & Hogg for the release of a mechanic's lien, and no consideration for the alleged payment of $461.42. The court disallowed both items, the latter as not established by the evidence and the first on the ground that the plaintiffs were not entitled to any affirmative relief. The court found several items of value chargeable to Phoenix on the ground of fraud which much more than off-set the two items, if valid. Some of these findings abundantly supported by the evidence will be noted. * * * All of these findings, supported as they are by evidence, justified the court in holding that Phoenix is not entitled to credit for the $9,000 and $461.42 items. * * * *

"* * * The Master disallowed all but $3,125 which was used to pay taxes. This is a just claim, but is more than off-set by the $14,000 and other items referred to above. * * *

"For the foregoing reasons the decree of the district court is affirmed."

Phoenix asserts that it was necessary that there be a pleading of counterclaim or set-off. The question of considerations was directly in issue. Furthermore, Phoenix' present contention is merely a collateral attack on the judgment. A judgment cannot be impeached collaterally on account of any defect in the pleadings. Such matter can only be claimed on direct appeal from the judgment and on assignment of error.

34 *C. J.*, pages 555, 560, 561, Sections 856, 860, 861;

Jarrell v. Cole, 215 F. 315, 131 C.C.A. 589;

Mengel v. Mengel, 145 Ia. 737;

Manson v. Duncanson, 166 U. S. 547, 17 S. Ct. 647;

Cooper v. Reynolds, 10 Wall. 308, 316, 77 U. S. 308.

Complainants, trustees and Phoenix, on appeal assigned as error "that the decree is beyond the scope of the pleadings and parties and of the proper evidence under the pleadings" (Trustees' assignment 23, F.R. 507; Phoenix' as-

signment 59, F.R. 526-527). The assignments of error were overruled by the Circuit Court of Appeals' affirmance of the case (F.R. 1695, 1709, 98 Fed. (2) 421, 429).

Phoenix litigated the question of consideration and the Court had jurisdiction of the subject matter and of the parties, and any claimed error in the decision could only be reviewed on appeal and decision is final even if it were erroneous.

Thornton v. Carter, (8 C.C.A.), 109 F. (2) 316, 320.

The petition of intervention was sufficient and the items have been fully litigated.

In 57 *C. J.*, page 389, Sec. 40 it is stated:

> "Although the matter could not be interposed as a set-off because no action could be maintained thereon it may still be available by way of defense."

In 49 *C. J.*, page 310, Sec. 380 it is stated:

> "Where matter relied upon is strictly a defense in whole or in part to plaintiff's cause of action, it need not be set up as a cross demand."

A court of equity, or a court possessing equitable jurisdiction, has inherent power as a part of its general jurisdiction, to allow or compel a set-off independent of statute. 57 *C. J.* 361; *Scott v. Armstrong,* 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059. The right to set-off formerly regarded as attaching to the remedy only and not to the debt itself, is now recognized, particularly by the federal courts, as a matter of substantive justice affecting substantive relations between the parties. *The Gloria,* 286 Fed. 188, 192; Questions of C.C.A., answered 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313.

In the federal courts set-off is not confined to matters arising out of the contract or transaction sued on. *Central Appalachian Co. v. Buchanan* (C.C.A. 6th), 90 Fed. 454, (opinion by Judge Lurton, concurred in by Judge Taft).

CONCLUSION.

The questions presented by the petition have been previously presented to this Court:

1. First Trust and Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, Trustees, and Phoenix Finance Corporation, Complainants, v. Iowa-Wisconsin Bridge Company, Defendant, Fayette D. Kendrick, et al., Interveners, 98 Fed. (2) 416; entitled in this Court, Phoenix Finance Corporation, petitioner, v. Iowa-Wisconsin Bridge Company, et al., No. 438, October Term, 1938; certiorari denied 305 U. S. 650; rehearing denied 305 U. S. 676.

2. Iowa-Wisconsin Bridge Company, Defendant Below, Plaintiff in Error, v. Phoenix Finance Corporation, Plaintiff Below, Defendant in Error, (Del.) 25 Atl. (2) 383; No. 403, October Term, 1942, this Court; certiorari denied October 26, 1942, 317 U. S. 671.

The questions presented by the petition have been determined by this Court in its prior decisions, and the petition presents no new question of general importance.

We respectfully submit Phoenix' petition for writ of certiorari should be denied.

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